No. 87 1053

FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

HERMENA PERLMUTTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the statutes under which petitioner was convicted, 31 U.S.C. § 5311 *et seq.* and 18 U.S.C. §§ 2 and 1001, provide her with fair warning that dividing a currency transaction of more than $10,000 into smaller segments, unaccompanied by any other acts, would violate those statutes and be construed as a crime?

PARTIES TO THE PROCEEDING

The sole parties to this proceeding are Hermena Perlmutter, he defendant-appellant in the court below, and the United States f America.

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No.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals below is reproduced in the Appendix at page 1a. There are two opinions of the District Court herein. One dismissed counts one through eight of the indictment[1] on petitioner's motion and the other, rendered after

1. The initial indictment was superseded twice. Petitioner was tried on five of the ten counts contained in the second superseding indictment. The Government withdrew the remaining five counts prior to trial and they were thereafter dismissed by the District Court.

trial, convicted petitioner on counts seven and eight and acquitted her on counts one, two and ten. These decisions are reported, respectively, at 636 F. Supp. 219 (S.D.N.Y. 1986) and 656 F. Supp. 782 (S.D.N.Y. 1987).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals below was entered on October 8, 1987. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 31 U.S.C. § 5313(a) which provides as follows:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other

monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

3. 18 U.S.C. § 2(b) which provides as follows:

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4. 18 U.S.C. § 1001 which provides as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

5. 31 C.F.R § 103.22(a) (1982) which provides as follows:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

STATEMENT OF THE CASE

Petitioner is an attorney who was convicted in the United States District Court for the Southern District of New York on two counts involving the structuring of the same currency transaction at Emigrant Savings Bank in New York City. One such count charged a violation of 18 U.S.C. §§ 2(b) and 1001 (Count Seven) while the other (Count Eight) charged a violation of 31 U.S.C. §§ 1052(e), 1058, 1081 and 1082[2] and 18 U.S.C. § 2(b).

Counts seven and eight of the indictment, on which petitioner was convicted, together with counts one through six were dismissed before trial by the District Court for legal insufficiency under the Fifth Amendment. That dismissal is reported in the opinion of the District Court at 636 F. Supp. 219. The Government filed a notice of appeal from that order of dismissal.

While the Government's appeal from the order of dismissal was pending, the United States Court of Appeals for the Second Circuit decided *United States v. Heyman, infra.* Based upon the *Heyman* decision, the Government moved in the District Court for reconsideration of the dismissal of counts one through eight.

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2. The Currency Transaction Reporting Act, subsequently renumbered as 31 U.S.C § 5311 *et seq.*

The District Court granted the Government's motion and thereafter, the Court of Appeals returned the case to the District Court which then vacated its prior order of dismissal.

A bench trial was conducted in the District Court. The Government withdrew counts three through six and ten of the indictment and the District Court either dismissed or acquitted the petitioner on all remaining counts except counts seven and eight on which petitioner was convicted. Counts seven and eight both relate to the same events, namely, the purchase by the petitioner at Emigrant Savings Bank of two separate teller's checks at different times on October 14, 1982, one for $7,000 and one for $5,000. The checks were subsequently used by petitioner's client for the lawful purchase of shares of stock in a residential cooperative corporation.

There was no evidence at the trial that petitioner acted for her personal or pecuniary gain or that she was was involved in any other illegal scheme. On the contrary, the acts alleged in the indictment involved transactions in which petitioner acted as an attorney representing clients in connection with the purchase of a private residence. Petitioner used no false names or accounts and was not employed by the financial institution. The District Court determined that the applicable law in the Second Circuit required the two purchases of the teller's checks to be aggregated and thereby found the petitioner guilty of causing a financial institution to fail to file a Currency Transaction Report (hereinafter "CTR") with Internal Revenue Service in connection with a currency transaction in excess of $10,000. The District Court suspended sentence and placed petitioner on probation for a period of three years.

Petitioner appealed her judgment of conviction to the United States Court of Appeals for the Second Circuit. That court affirmed her conviction and it is from that judgment that review by certiorari is now sought.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW SHOULD BE REVIEWED BECAUSE OF A CONFLICT AMONG THE CIRCUITS OF THE FEDERAL COURTS OF APPEAL ON THE ISSUE RAISED BY THIS CASE.

The principal basis underlying this petition is the conflict between eight Circuits of the Court of Appeals on the issue raised by this case. The petitioner's conviction rests upon her conduct in dividing a currency transaction aggregating more than $10,000, into two parts of less than $10,000 each so that the bank did not file a CTR. On the issue of whether such structuring of a currency transaction can support a conviction, three Circuits, the Second, Fifth and Tenth, have held in the affirmative. However, four Circuits, the First, Seventh, Eighth and Ninth have reversed convictions based upon the same conduct and have thereby taken a position directly contrary to that of the Second, Fifth and Tenth Circuits. The view of the First, Seventh, Eighth and Ninth Circuits is that the applicable statutes and regulations did not provide sufficient notice to the ordinary person that structured transactions would constitute criminal conduct, since those statutes did not impose upon a bank customer a duty to disclose or aggregate such transactions. Another Circuit, the Eleventh, probably shares this view. Accordingly, of the eight Circuits which have reviewed this issue, five have ruled that conduct similar to petitioner's would not constitute a crime.

The most prominent case in support of petitioner's position is *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985). There, the defendant structured various bank transactions in order to keep each one under $10,000. Some of these transactions were confined to a single day while others were not; on one single day,

defendant Anzalone purchased three checks from the same bank, all of which totaled $25,000 but no one of which exceeded $10,000. Thereafter, but on different dates, Anzalone purchased additional checks, each of which was limited to less than $10,000, for a total of $100,000.

The theory of the prosecution in *Anzalone*, as in the instant case, was that this was a "structured" transaction which was per se illegal. Since the defendant failed to inform the bank of the "structured" nature of his transfers, the Government argued, he caused the bank to fail in its duty to report these transfers. The basic issue was whether defendant had sufficient fair warning that such failure by him to alert the bank subjected him to criminal sanctions under the same statutes and regulations involved in the instant case. The facts of *Anzalone* are indistinguishable from those of this case except that *Anzalone* also had other transactions, on different dates, for which he was also convicted in the District Court. Any effort to confine the *Anzalone* case to one involving transactions on separate dates fails to reflect the facts therein; Anzalone's first three purchases, totaling over $25,000, all occurred on a single day, November 13, 1980.

In *Anzalone*, the First Circuit concluded that nothing in either the statute or regulations supported the proposition that a structured transaction by a customer constituted an illegal evasion. In reaching this conclusion, the First Circuit turned to a report to Congress by the Comptroller-General of the United States dated July 23, 1981. That report acknowledged the deficiencies in the regulations consisting of silence on the subject of multiple transactions. The report recommended a revision of the regulations to proscribe dividing a large transaction into smaller transactions, a recommendation subsequently followed by the enactment of new legislation. The fact that one agency of the Government, interested in enforcement and implementation of the law, recognized that the Act was deficient by silence or lack of clarity

should be persuasive evidence of the vagueness of the Act on this point.

The First Circuit found "confusion and uncertainty" in the law and held that it could not impose a legal duty on the defendant by judicial implication. The Reporting Act and its regulations imposed no duty on the defendant to inform the bank of the "structured" nature of his transactions. The application of criminal sanctions for these activities violated the fair warning required by the due process clause of the Fifth Amendment. Similarly, there was no illegal concealment under 18 U.S.C. § 1001 since the defendant had no legal duty to disclose. In this context, it was also noted that defendant did not aid, abet or cause the commission of a crime. Since the bank was not aware of the "structured" nature of the transaction and the statute did not require the bank to aggregate divided transactions, its failure to report did not constitute an offense.[3]

After *Anzalone*, and relying on its reasoning, the Court of Appeals for the Seventh, Eighth and Ninth Circuits reversed convictions under the Currency Transaction Reporting Act. The Ninth Circuit has uniformly followed *Anzalone* in its decisions in *United States v. Reinis*, 794 F.2d 506 (1986), *United States v. Varbel*, 780 F.2d 758 (1986) and *United States v. Dela Espriela*, 781 F.2d 1432 (1986).

In *United States v. Reinis*, the defendant was convicted based on a series of currency conversions at banks, each for less than $10,000, extending over ten days during which he and his agents purchased cashier's checks totaling more than $10,000 from the

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3. At that time Form 4789, the Currency Transaction Report, required the financial institution to treat multiple transactions in one day totaling more than $10,000 as a single transaction and to report them "if the financial institution is aware of them." Form 4789, however, was not intended to be exhibited to customers.

same bank. Aside from structuring his transactions, the defendant committed no other acts to conceal their nature.

In *United States v. Varbel*, the defendants avoided a triggering of the filing requirements by purchasing cashier's checks at different banks. The Ninth Circuit again concluded that the statute did not impose a duty upon defendants to inform the different banks of the nature of their transactions, *i.e.*, that they were simultaneously conducting similar transactions at other banks. Such a duty, the court held, could not be imposed by implication but only by clear and unambiguous language.

United States v. Dela Espriela also involved only structured transactions by a bank customer. There, one of the defendants had currency converted into cashier's checks at many different banks. The counts of the indictment based on alleged violations of the Currency Transaction Reporting Act were all dismissed as legally insufficient based on *United States v. Varbel, supra*.

The Eighth Circuit followed *Anzalone* in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986). There, the defendant was convicted under the Currency Transactions Reporting Act and under 18 U.S.C. § 2 because of structured transactions. On one day, he converted $44,500 in currency into cashier's checks. Several weeks later, he repeated the process with $53,300 in currency. Each separate transaction was less than $10,000 and the transactions were conducted at several different banks. Although the opinion does not so state, it appears that at some banks the total of the transactions exceeded $10,000 on the same day. The Eighth Circuit, following *Anzalone* and *Varbel*, held that the defendant had no duty to disclose the unitary nature of the transactions and therefore was not guilty of concealing information from the Government.

In *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987),

the defendant divided a single transaction into several bank deposits. On each day the deposits aggregated more than $10,000 so that the structuring of these transactions caused the depository bank to not file CTRs. The Seventh Circuit first found that the Currency Transaction Reporting Act did not impose any duty upon the bank in question to file a report of the structured transaction. Proceeding from this premise, the court held that the transactions did not constitute "material facts" within the meaning of 18 U.S.C. § 1001 so that the defendant could not be liable under 18 U.S.C. § 2(b) for causing the bank to fail to disclose a material fact. The opinion expressly rejected conflicting decisions in other Circuits and the reasoning underlying those decisions.

The Eleventh Circuit, in *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986) appears to follow *Anzalone*. Denemark purchased cashier's checks from several banks although he did not transact more than $10,000 of business at any single bank. There was no transaction at any one financial institution which would have required that institution to file a CTR even if it had been aware of the transactions at the other institutions. On this basis, the conviction was reversed, the 11th Circuit rejecting the Government's argument that all of the transactions should be considered together in a substance over form analysis. *But see, United States v. Cure,* 804 F.2d 625 (11th Cir. 1986).

The Second Circuit's decisions holding that structuring a currency transaction will support a conviction are *United States v. Heyman*, 794 F.2d 788 (1986), *cert. denied,* 107 S. Ct. 585 (1986) and *United States v. Nersesian*, 824 F.2d 1294 (1987). In *Heyman,* defendant was an account executive at Merrill Lynch, a "financial institution" as defined under the Currency Transaction Reporting Act. He was approached by a potential customer who disclosed that he wished to invest a large amount of untaxed cash. To avoid the filing of CTRs by his employer,

the defendant opened a series of accounts in the names of various people, each with a currency deposit of less than $10,000. The defendant knew that the names of these people were being used merely as "fronts" for one customer, to falsify and conceal the identity of the customer and the source of the currency. The Second Circuit affirmed the defendant's conviction. In *Nersesian*, the defendants were convicted of conspiring to conceal material facts by causing a bank not to file CTRs in violation of 18 U.S.C. § 371. The opinion notes the division among the Circuits on the question of whether a bank customer can be prosecuted for causing a bank to fail to file a report by not disclosing the structured nature of the transaction. The affirmance in *Nersesian* is therefore a continuation of the Second Circuit's position on this point.

The Fifth Circuit and the Tenth Circuit, based on one decision in each of those Circuits, are apparently in agreement with the Second Circuit in espousing the view that a bank customer can be convicted for failing to disclose the nature of divided transactions. *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979); *United States v. Cook*, 745 F. 2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220, 105 S. Ct. 1205 (1985). *Thompson* possibly does not fully disclose the views of the Fifth Circuit since the defendant in that case was the Chairman of the Board of the bank. On the other hand, the Second Circuit has stated in *Heyman* that there is no basis for distinguishing between a customer and a bank employee. 794 F.2d at 792, n. 6.

In now urging the issuance of a writ of certiorari, petitioner is aware of the denial of certiorari by this Court in *United States v. Heyman, supra*. Since that denial, however, it has become apparent that the division among the Circuits is real and that the conflict has become more pronounced. Moreover, the majority of the Circuits which have now ruled on this issue would have reversed this petitioner's conviction.

Even after *Heyman*, it was possible to attempt to harmonize the various decisions. Heyman's conduct, aside from violating the Currency Transaction Reporting Act, was otherwise wrongful. He violated other criminal statutes as well as securities laws. On a subjective basis, Heyman therefore could not credibly assert that he did not have appropriate notice of the wrongful nature of his acts. With its decisions in *Nersesian* and the instant case, however, the Second Circuit has clearly taken a position at odds with that of the First, Seventh, Eighth and Ninth Circuits.

Without further review of the instant case, the petitioner will remain convicted for acts which, if committed within the jurisdiction of a majority of the other Circuits, would not have supported a conviction. In the case at bar, the petitioner suffers not only the usual disabilities of a criminal conviction but the loss of her professional license which she maintained in good standing for a period of over thirty years prior to her conviction.

II.

THE DECISION BELOW SHOULD BE REVIEWED SINCE THE CONDUCT OF THE PETITIONER CONSISTED ONLY OF STRUCTURING A CURRENCY TRANSACTION AND WAS NOT ACCOMPANIED BY WRONGFUL ACTS.

Petitioner also urges that the Currency Transaction Reporting Act was not sufficiently clear to provide her with fair warning that her conduct was proscribed. That conduct consisted of nothing more than dividing a currency transaction into two segments. The Act and the Regulations promulgated thereunder imposed a duty only upon financial institutions to file reports. Although the Act empowered the Secretary of the Treasury, by regulation, to impose the reporting duty on bank customers, the Secretary elected to require reporting only by financial institutions and not by their customers. When petitioner structured her currency transactions,

she reasonably believed that her conduct was not criminal, particularly since she did not employ an alias and was engaged in no other illegal activity. The duty to disclose the facts of a currency transaction should not be imposed by implication, when the penalty is a criminal violation and no illegality is contemplated.

Only the Second Circuit has been willing to affirm a conviction based on solely structuring a currency transaction unaccompanied by other wrongful acts. Where structuring a currency transaction is involved, the affirmance of the conviction has almost invariably occurred where the structuring was abetted by other wrongful acts. When such other wrongful acts are present, the conviction has been affirmed. Conversely, if the facts reveal nothing more than a structuring of a currency transaction, a reversal has resulted. A brief summary of various Court of Appeals decisions establishes this point.

In the following cases, the conviction was affirmed when other wrongful acts accompanied the structuring of the currency transaction: *United States v. Thompson, supra* (defendant was the Chairman of the Board of a bank who abused his authority to effect fictitious loans designed to cover cocaine purchases); *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) (defendant acted in concert with a confederate, both of whom used false names, concealing the fact from the bank that they were acting together); *United States v. Puerto*, 730 F.2d 627 (11th Cir., 1984), *cert. denied sub. nom, Everett v. United States*, 469 U.S. 1037, 105 S. Ct. 162 (1984) (defendant conspired with a bank employee who was instructed to place fictitious names on the bank checks and on the currency transaction reports); *United States v. Sans*, 731 F.2d 1521 (11th Cir. 1984),*cert. denied*, 469 U.S. 111, 105 S. Ct. 791 (1985) (defendants acted in concert with two bank officers); *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220, 105 S. Ct. 1205 (1985) (defendants employed false identification); *United States v.*

Heyman, supra (defendant was an employee of a financial institution who encouraged his customer to open separate accounts in nominee names); *United States v. Giancola*, 783 F.2d 1549 (11th Cir. 1986) (fictitious names used); *United States v. Cure, supra,* (bank checks purchased in connection with a money-laundering scheme bearing fictitious names); and *United States v. Nersesian, supra* (conspiracy among multiple defendants to violate narcotics laws directly leading to violations of the Currency Transaction Reporting Act).

Each case, other than the instant one, which involved only the structuring of a currency transaction, without other illegal acts, has resulted in a reversal of conviction. *See United States v. Anzalone, United States v. Dela Espriela, United States v. Reinis* and *United States v. Gimbel*, all *supra.* The validity of the distinction now urged by petitioner has been recognized by the Eleventh Circuit, which has both affirmed and reversed convictions for violations of the Currency Transaction Reporting Act. That court stated in *United States v. Cure*, 804 F.2d at 627:

> Appellant is also correct in arguing that bank customers have no obligation to structure their transactions so as to trigger the reporting requirements of Section 5313. *United States v. Denemark*, 779 F.2d 1559, 1561-64 (11th Cir. 1986).

Later, at 804 F.2d 629, that court said:

> . . . a bank customer is not liable *merely* for structuring his cash transactions so as to create transactions in which the filing of a CTR is not required. (Emphasis supplied.)

With this language in mind, it is clear that the Eleventh Circuit, as well as the First, Seventh, Eighth and Ninth Circuits, would

have reversed petitioner's conviction on the ground that she did nothing more than structure her transactions without any concomitant criminal conduct. Accordingly, petitioner presently occupies the unenviable position of being the only person convicted under the Currency Transaction Reporting Act based solely upon the division of a currency transaction into segments without any other improper conduct.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment herein of the United States Court of Appeals for the Second Circuit. It is respectfully requested that this petition for such a writ be granted.

Respectfully submitted,

STEVEN W. WOLFE
Attorney for Petitioner

HERBERT C. KANTOR
LEO KAPLOWITZ
Of Counsel

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 8th day of October, one thousand nine hundred and eighty-seven.

PRESENT:

HONORABLE GEORGE C. PRATT,
HONORABLE FRANK X. ALTIMARI, Circuit Judges,
HONORABLE FRANK A. KAUFMAN, District Judge
(U. S. District Court for the District of Maryland, sitting by designation.)

No. 87-1232

UNITES STATES OF AMERICA,

Appellee,

-against-

HERMENA PERLMUTTER

Defendant-Appellant.

This appeal from a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, came on to be heard on the transcript of the record and was argued by counsel.

Appendix A

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from be and hereby is affirmed. Constrained by *United States v. Nersesian*, 824 F.2d 1294 (2d Cir. 1987), and *United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, 107 S. Ct. 585 (1986), we hold that defendant's conduct in structuring her bank deposits did constitute criminal conduct in violation of 31 U.S.C. § 5313 when supplemented by 18 U.S.C. § 2(b).

s/ George C. Pratt
George C. Pratt, U.S.C.J.

s/ Frank X. Altimari
Frank X. Altimari, U.S.C.J.

s/ Frank A. Kaufman
Frank A. Kaufman, U.S.D.J.

Filed October 8, 1987

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.